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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1207~~ 790 ~~469~~ 181

THE POTOMAC STEAMBOAT COMPANY, CLAIMANT OF THE STEAMER "EXCELSIOR," APPELLANT,

vs.

THE BAKER SALVAGE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED NOVEMBER 10, 1884.

in the Louisiana case, upon the above assignments, may be applied here, without repeating and reprinting the same.

A. H. GARLAND,
Attorney-General.
HEBER J. MAY,
Assistant Attorney.

Relying on the opinions of the court below in the case of The State of Louisiana *vs.* United States, I submit this case without brief.

VAN H. MANNING,
Attorney for Appellee.

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vs.

THE BAKER SALVAGE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

To the Honorables the Judges of the Supreme Court of the United States:

The petition of the Potomac Steamboat Company, of Washington, D. C., respectfully represents that it is aggrieved by the entry of a final decree of the circuit court of the United States for the eastern district of Virginia, in admiralty, dated the 17th day of May, 1884, in a cause therein pending between the Baker Salvage Company, libellants, and the steamer "Excelsior," of the Potomac Steamboat Company, claimants.

A transcript of the record in the said cause, embracing only the pleadings, finding of facts, and final decree, is herewith filed; from which decree your petitioner has prayed and obtained an appeal, and for causes of error in said decree here assigns the following:

First. The said decree is erroneous in this, that the finding of facts whereon the said decree is based ascertains, as proved, an agreement between the libellants and claimants for a *quantum meruit* for the work and labor done by the alleged salvors, and it was error to decree salvage therefor.

Second. That the decree, in view of all the facts found by the court below, was plainly and grossly excessive in the amount awarded to libellants.

2 Wherefore your petitioners pray that the said decree may be reviewed and reversed.

THE POTOMAC STEAMBOAT COMPANY,
Petitioner,
By T. S. GARNETT, JR., (of White and Garnett,)
Counsel.

3 In the District Court of the United States for the Eastern District of Virginia.

THE BAKER SALVAGE COMPANY
vs.
THE STEAMER EXCELSIOR. } In Admiralty.

To the Hon. Robert W. Hughes, judge of said court:

The libel of The Baker Salvage Company, a corporation, the principal office of which is in the city of Norfolk, in the State of Virginia, against the steamer Excelsior, her boilers, engines, and machinery, and her tackle, apparel, and furniture, and her cargo, which has been unladen, of which said steamer ——— Baldwin is, or late was, master, and against all persons intervening for their interest therein, in a cause of salvage, civil and maritime, alleges as follows:

1st. That the said libellant is a body politic and corporate, duly incorporated under the laws of the State of Virginia, and the principal office of said corporation is in the city of Norfolk, in said State.

The libellant's business is that of a wrecker and salver, in which it is extensively engaged. Its operations extend along the Atlantic coast, in the Atlantic Ocean, and upon the waters tributary thereto, wherever its services are needed and can be rendered. A large

amount of capital is embarked in its said business, to wit, about the sum of one hundred thousand dollars, and it keeps constantly
4 on hand, for the purpose of saving life and property in peril upon the dangerous waters and coasts above mentioned, a number of powerful steamers or steam tugs, sail vessels, a large quantity of the most approved and efficient wrecking material and apparatus, such as anchors, chains, and cables, of unusual size and weight, powerful hoisting engines, steam pumps, diving apparatus, and surf-boats, and has constantly in its employment a large force of skilled seamen and divers, and navigators, and men of long experience, and the finest attainments in the said wrecking and salvage business.

This immense equipment is kept up during most of the year at a cost of nearly five thousand dollars per month, and during the business season at a cost of about twenty-five hundred dollars per month, and these are the mere running expenses and are in addition to the interest on the large amount of capital invested and the wear and tear upon the property used. The steamers and other vessels and the wrecking apparatus of the company are constantly exposed to the greatest perils, and any loss that overtakes them is a total loss, as no insurance companies will take stock upon property engaged in said business. This large and expensive equipment is kept constantly in readiness to go at the shortest notice to the assistance of life and property in distress and danger.

2nd. On the fourth day of December, 1882, at about seven o'clock p. m., information was received at the office of the libellant in Norfolk by telegram from Old Point, said telegram being sent to libellant by the master of the "Excelsior," that the steamer "Excelsior," while on a voyage from Norfolk to Washington, D. C., had been run into by the United States tug "Fortune," and afterwards had sunk on Hampton bar.

5 At about nine p. m. the same evening the libellant dispatched the large and powerful steamer "Resolute," with a full wrecking crew and fully equipped with a diver, diving apparatus, and wrecking gear, having in tow the schooner "Scud," also belonging to the libellant, fully equipped for wrecking and salvage service, and the whole expedition was under the command of Captain E. M. Stoddard, a man of long and ample experience and great skill in the said business of the libellant. Not knowing the exact position of the "Excelsior," the said expedition went alongside of the wharf at Old Point and lay there until daylight of the morning of the 5th of December, when they went to the "Excelsior." She was found sunk on the outside of Hampton bar, about two and a half miles from Old Point, with her head on the bar and sunk so deep that her main deck was partly submerged aft. She was full of water and lying in an exposed position to winds anywhere from the southward, and was in danger, unless speedily relieved from her position, of going to pieces. It was then calm. Captain Stoddard, as soon as he reached the "Excelsior" with his said expedition, at once set to work with a large force of wreckers and laborers under him, and the said "Resolute" and "Scud" and wrecking apparatus, to save the said steamer "Excelsior" and her cargo, and did so with the consent and

at the request of the master of the said "Excelsior." A diver was sent down to investigate the injury which had been done her and found a large hole in her starboard side, said to have been caused by collision with the United States tug "Fortune." The diver battened up this hole, placing canvas over it, and then the work of
6 pumping said steamer out was begun with two steam pumps belonging to the libellant, one being placed on the "Excelsior" and the other operated from the "Resolute." In the evening of [the] 5th the wind began to blow very fresh from the southeast.

The work was continued night and day, until the wreck was sufficiently cleared of water to be taken in tow and delivered in Norfolk, which was done, and the said steamer "Excelsior" brought safely to her wharf in the said city on the evening of the 6th of December. Before the said steamer was taken in tow, which was about two p. m. o'clock of the 6th of December, all her cargo was safely landed at Old Point wharf by your libellant's said expedition. During the night of the 5th of December, while the "Excelsior" was still on Hampton bar, the "Resolute" was kept alongside of her, at great risk to the "Resolute," in order to be in readiness to save the lives of those on board the "Excelsior" and engaged in the work of saving her and her crew, in case the sea, which was rough, and the wind, which was from the southeast and was blowing very fresh, and might at any time become more violent, should break up the wreck and render the removal of those upon her necessary. The tugs "Olive Branch" and "Olive Baker," in the employment of the libellant, assisted in towing the "Excelsior" to Norfolk, and the tug "Nettie" was also employed by the libellant in carrying wrecking material and otherwise assisting in the salvage service, and the libellant's steamer "Victoria J. Peed" also assisted, and was kept in attendance for some time in case her additional assistance should prove necessary. The whole service was speedily, efficiently, and successfully rendered, and a large amount of valuable property saved from impending destruction. The property of the libellant en-
7 gaged in the service was very valuable, being worth at least fifty thousand dollars.

3. The libellant is entitled to a just share of said steamer and her cargo, for saving the same as aforesaid, and also of the boilers, engines, machinery, furniture, tackle, and apparel of the said steamer, and the claim of the libellant for such salvage is a lien upon the said steamer and her cargo, and her boilers, &c., all of which are very valuable, the exact amount being unknown to the libellant.

4. The said steamer is now at Norfolk, in the said district, and within the jurisdiction of this honorable court.

5. All and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellant prays that process, in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said steamer "Excelsior," her boilers, engines, machinery, tackle, apparel, and furniture, and also against her cargo, which was saved as aforesaid; and

that all persons claiming any interest therein may be cited to appear and answer upon oath all and singular the matters aforesaid, and that this honorable court will be pleased to decree to the libellant a reasonable and proper salvage compensation and reward, in proportion to the value of the said steamer and her cargo, and that the said "Excelsior," her boilers, engines, machinery, tackle, apparel, and furniture, and her said cargo may be condemned and sold to pay said salvage, with costs, charges, and expenses, and the libellant may have such other and further relief in the premises as in law and justice they may be entitled to receive.

(Signed) E. M. STODDARD,
8 *General Manager Baker Salvage Co.*

ELLIS & THOM,
Proctors for Libellant.

Subscribed and sworn to before me, this 21st day of February, 1883.

CHAS. T. BARRY, *Clerk.*

Filed Feb'y 21st, 1883. CHAS. T. BARRY, *Clerk.*

9 In the District Court of the United States for the Eastern District of Virginia.

THE BAKER SALVAGE COMPANY, Libellants,
vs.
THE STEAMER "EXCELSIOR," OF THE POTOMAC STEAMBOAT COMPANY, Claimants. } In Admiralty.

To the Honorable Robert W. Hughes, judge of the district court of the United States for the eastern district of Virginia:

The Potomac Steamboat Company, claimants for the steamer "Excelsior," her engines, boiler, and machinery, tackle, apparel, furniture, and cargo, intervening for their interest therein, for answer to the libel and complaint of the Baker Salvage Company against the said steamer "Excelsior," her engines, boilers, and machinery, tackle, apparel, furniture, and cargo, alleges as follows:

First. These respondents, in answer to the allegations of the first article of the said libel, say that they believed it is true as alleged, that the said The Baker Salvage Company is a duly incorporated joint stock company, conducting the business of wrecking in all its departments in the waters of this district, but these respondents are not advised of the extent of their operations as wreckers, nor
10 of the real value of the vessel, property, and outfit of the said company, nor of the amount in value of the capital stock employed and invested by the company in their said business; they, therefore, neither admit nor deny the truth of those allegations, which, in view of the further allegations of said libel hereinafter answered, these respondents say are immaterial.

Second. In answer to the allegations of the second article of the said libel, which are partly true and partly false, these respondents

say that on the fourth day of December, 1882, the said steamer "Excelsior," of the Potomac Steamboat Company's line, then plying regularly between the ports of Norfolk, in Virginia, and Washington city, in the District of Columbia, left the said port of Norfolk at five o'clock p. m. of that day, under the command of Theodore E. Baldwin, her master, and a competent crew, bound on her usual voyage to the city of Washington; that at or near six o'clock p. m., while in Hampton Roads, and proceeding on her course to make a landing at Old Point wharf, the said steamer "Excelsior" was in collision with the United States Steamer "Fortune," from the effect of which collision, it became necessary to run the "Excelsior" ashore; this was promptly done by her said master, who placed her safely aground on Hampton bar, about two miles from Old Point, and shortly thereafter he sent a telegram from Fort Monroe to the said libellants at Norfolk, requesting assistance with steam pumps, and asking that they be sent, to arrive at low-water that evening.

It is true, as alleged, that, upon the receipt of said telegram, the libellants made ready and despatched the steamer "Resolute" and the schooner "Scud" with a diver and apparatus under the charge of E. M. Stoddard, general manager of the Baker Salvage Com
11 pany; and it is also true that the said steamer and schooner, under his command, passed by the bar on which the "Excelsior" was lying and proceeded to Old Point wharf, alongside of which they quietly spent the whole night; that on the morning of the 5th day of December they were brought alongside of the "Excelsior" by the said E. M. Stoddard, who came on board the "Excelsior" and then and there met the said T. E. Baldwin, her said master. Before permitting any work to be done on the steamer "Excelsior," her said master requested Captain E. M. Stoddard to say what he would charge to raise and float the steamer and tow her to Norfolk. This request was refused by Captain Stoddard, but he added that the price for such work would be fair and reasonable. Finally, the following verbal agreement was made between them and assented to then and there by Captain Baldwin on behalf of the steamer "Excelsior," and by Captain Stoddard on behalf of the said The Baker Salvage Company, to wit: It was agreed that there would be no salvage claimed by the said company; that they would raise and float the steamer "Excelsior" and tow her to Norfolk, Virginia, as soon as possible, and in the event that the said The Baker Salvage Company and the Potomac Steamboat Company did not agree as to the amount charged for the service rendered, then the matter was to be settled by arbitration. The terms of said agreement were committed to writing by the said T. E. Baldwin, and the original memorandum thereof, signed by him as master of the "Excelsior," is herewith filed, marked "Exhibit A," and prayed to be taken as part of this answer; that with this understanding, and upon the faith of said agreement, the work of raising and floating the said steamer "Excelsior" was permitted to proceed, and did ac-
12 cordingly proceed in manner and form as the libellants have alleged.

The operation itself was simple and easily performed. By the

assistance of a diver the hole in the bow of the steamer was soon stopped, and the work of pumping out the water from her hull was accomplished by the use jointly of the engines of the "Excelsior" and the "Resolute."

Within twenty-four hours from the commencement of the work the said steamer "Excelsior" was afloat, and on the afternoon of the sixth day of December, 1882, was towed back to her wharf in the city of Norfolk. The said work was, as from the nature of the case it should have been, speedily and satisfactorily performed, without difficulty, peril, or any risk thereof to the said libellants or to any of their employees or property engaged therein. That during the whole time the weather was unusually fair and very favorable for the operation aforesaid, and at no time was there the slightest danger or fear of harm to the "Excelsior." The respondents deny that there was the least danger of her breaking up; they deny the allegation that "the sea was rough," as also they deny that "the wind from the southeast was blowing very fresh," if thereby it be intended to allege that there was any danger from either wind or sea. Respondents deny the same, and they further deny the libellants' allegation that the "Resolute" was kept alongside of her, the "Excelsior," at great risk to the "Resolute." They deny that the lives of those on board the "Excelsior," either of her own passengers and crew or of the employees of the said libellants, were at any time in danger. On the contrary thereof, they say that the whole operation was conducted quietly, in a harbor perfectly safe and well protected, in fair weather, and entirely without peril of any kind, or any risk thereof.

13 Respondents deny that the tugs "Olive Branch," "Olive Baker," "Nettie," and "Victoria J. Peed," or either of them, formed any part of the libellants' said expedition, or assisted in the said alleged salvage service; on the contrary they say that whatsoever service they or either of them then rendered was only ordinary towage service, which the said libellants had agreed to render, and should be paid therefor accordingly.

Third. These respondents, in answer to the allegations of the third article of the said libel, deny that the libellants are entitled to any share of the said steamer and cargo, her engines, boilers, and machinery, tackle, apparel, or furniture. They deny that the service rendered to the said steamer was such meritorious salvage service as they have alleged; on the contrary thereof respondents say that the libellants agreed, as above recited, that no salvage should be claimed, and that the service should be paid for at what it was reasonably worth upon a fair and reasonable contract between them; and the respondents here say that they have at all times been ready and willing to perform their said agreement in all respects, and are now ready and willing to pay such reasonable compensation as the said libellants are entitled to receive; but the said libellants have not demanded of the claimants any such reasonable compensation, nor do they allege in their said libel that any demand whatsoever of any sum of money whatsoever has been made by them of the said claimants for the said alleged salvage service.

14 These respondents, therefore, submit to the judgment and determination of this honorable court the amount of compensation the said libellants may be reasonably entitled to receive in the premises as the nature of their case and law and justice may require.

Fourth. That all and singular the premises are true.

Wherefore the claimants pray that this honorable court will be pleased to pronounce against the libel herein, and that the same may be dismissed with costs to these claimants to be taxed.

[SEAL.] THE POTOMAC STEAMBOAT CO.,
By its President,
CHARLES CHAUNCEY.

WHITE & GARNETT,
Proctors for Claimants.

STATE OF PENNSYLVANIA, }
City and County of Philadelphia, } *ss:*

On this 24th day of March, A. D. 1883, before me, a notary public for the Commonwealth of Penn'a, residing in Philadelphia, personally appeared Charles Chauncey, who, being sworn according to law, declared that he was the president of the above-named Potomac Steamboat Company, and that the seal above affixed by him is the corporate seal of said company; and further, that the facts set forth in the above answer are true to the best of his knowledge and belief.

Witness my hand and official seal, the day and year aforesaid.

A. J. D. DIXON,
Notary Public.

Filed April 5th, 1883. CHAS. T. BERRY, *Clerk.*

15 EXHIBIT "A," with Answer.

T. E. Baldwin. Memo. (December 5th, 1882) of Agreement made with Capt. Stoddard, Sup't of the Baker Salvage Company.

HAMPTON ROADS, *Dec. 5th,* 1882.

Memorandum of an agreement made by and between —— Stoddard, sup't of the Baker Salvage Company, of Norfolk, Va., and T. E. Baldwin, master of the steamer "Excelsior," of the Potomac Steamboat Co., said steamer being sunk on Hampton bar December 4th, 1882.

It was agreed that there was to be no salvage.

The said Baker Salvage Company agreed to raise and float the steamer "Excelsior" and tow her to Norfolk, Va. The work to be done as quickly as possible; the bills to be rendered; and, in the event of the said Baker Salvage Company and the Potomac Steamboat Co. not agreeing as to the amount charged for services rendered, then the question was to be settled by arbitration.

T. E. BALDWIN, *Master.*

Witness: Purser steamer "Excelsior."

16 [Endorsed:] The Baker Salvage Company *vs.* The Steamer Excelsior. In admiralty on appeal.

Statement of Facts and Findings of Court. Filed May 17th, 1884. C. T. Barry, Deputy Clerk.

In the United States Circuit Court for the Eastern District of Virginia.

THE BAKER SALVAGE COMPANY *vs.* THE STEAMER "EXCELSIOR." } In Admiralty. On Appeal.

Upon the pleadings in the cause and the depositions of witnesses, evidence in the cause, and argument of counsel, the court finds the facts in the case to be as follows:

On the afternoon of the fourth of December, 1882, at five o'clock, the steamer "Excelsior," Captain T. E. Baldwin, of the Potomac Steamboat Company, plying between Norfolk, Va., and Washington, D. C., touching at Old Point, Fortress Monroe, left her dock at Norfolk, steamed down the Elizabeth river and into Hampton Roads, heading the usual course to make a landing at Old Point wharf. She had on board a competent crew and an average number

17 of passengers, the agreed value of the steamer being one hundred and fifty thousand dollars and of her cargo ten thousand dollars.

As the "Excelsior" was heading the aforesaid course in Hampton Roads, at or near six p. m., the United States steam tug "Fortune" came into collision with her by an accident. The "Fortune" struck the "Excelsior," which is of wood, on the starboard bow, making a hole in her hull at least 8 by 10 feet; and it being apparent that the "Excelsior" must otherwise sink in deep water from the quantity she was making in her hull through the hole in her bow, she was promptly headed for the shore, going ashore on the south side of Hampton bar at about its middle point, about two miles from Old Point wharf, three or four miles from Sewell's Point, between half a mile and a mile from the Soldiers' Home shore, the nearest shore, and within a hundred yards of the channel, where she sank, full of water, with a hole extending from her hurricane deck far down under water, lying almost head on to the shore, in water ranging in depth from six to seven feet at her bow to from ten to twelve feet at her stern.

After ascertaining the above soundings and landing his passengers at Old Point Comfort, Captain Baldwin, of the "Excelsior," proceeded to the same point and sent the following telegram to The Baker Salvage Company, at Norfolk, Va.:

DECEMBER 4TH, 1882.

Send assistance, with steam pumps, to "Excelsior," on Hampton bar. Get here by low water.

Subsequently Captain Baldwin sent another telegram, as follows:

DEC. 4TH, 1884.

18 Del'y guaranteed. Bring steamer "Resolute," a diver, with appliances.

The first of these telegrams was received at the telegraph office, in Norfolk, at 8.2 p. m., and the other at 9.15 p. m., on the evening of the collision.

The Baker Salvage Company, through the agency of its superintendent and general manager, Captain E. M. Stoddard, at once, and vigorously, set to work in response to the telegrams, to render the aid asked for; and at or about ten p. m. a fully-equipped expedition, under the command of Capt. Stoddard, left Berkeley, opposite Norfolk, at the intersection of the southern and eastern branches of the Elizabeth river, where the wharves of The Baker Salvage Company are located, for the purpose of relieving the "Excelsior." The expedition consisted of the powerful wrecking steamer "Resolute," Hobbs, master, with her stationary steam pump, capable of pumping four hundred tons per hour, with the schooner "Scud" in tow, having on board a portable steam pump capable of pumping one hundred tons per hour, and a full complement of wrecking material and appliances, the whole manned by a crew of ten seamen experienced in wrecking operations, and accompanied by a skilled diver with diving apparatus. Captain Stoddard, making all reasonable haste, and in the exercise of his judgment, did not attempt to go alongside of the "Excelsior" that night, not knowing her exact position on Hampton bar, and being unable to identify her lights, but went directly to Old Point wharf, where he arrived about one o'clock on the morning of December 5th, when it was flood tide there.

19 Between that hour and daylight he secured the services of a number of laborers at Old Point, whose services he anticipated would be needed to remove the cargo, thus materially advancing the work for which he had come. At daylight on the morning of the 5th of December Capt. Stoddard, with the expedition above described, went to the "Excelsior," and found her lying, as above described, submerged to her main deck, with a hole in her bow, and full of water, water standing on her main deck aft at high tide, and about two feet below her guards at low tide.

The "Excelsior's" cargo had not been reached by the water, being stored about amidships, which was higher than the stern. Captain Stoddard at once had an interview with Captain Baldwin in the presence of the purser of the "Excelsior." Captain Baldwin asked what it was going to cost to get the ship off and deliver her at the railroad. Stoddard replied: "I do not know;" to which Baldwin replied: "This is not a salvage service;" to which Stoddard replied: "Call it what you please, so I get my pay;" to which Captain Baldwin replied: "It is no salvage service;" and they both agreed to submit to arbitration the amount to be received for the service by The Baker Salvage Company in case the two companies could not agree upon a sum.

At this point, viz., about seven o'clock on the morning of the 5th, Captain Stoddard began the direct operations upon the "Excelsior"

and her cargo for their relief. He brought the "Scud" alongside the "Excelsior," for the purpose of removing the steamer's cargo to Old Point wharf, and, placing the diving apparatus aboard the "Excelsior," set the diver to work to ascertain minutely the exact
20 extent of the wound that had been sustained by the steamer in the collision; and while this was going on he returned to Old Point wharf in the "Resolute," and brought off the laborers above mentioned, who had been employed to assist in the removal of cargo and lumber to be used by the diver in battening up the hole.

The work of removing the cargo to Old Point wharf was continued throughout the day, until after three trips of the "scud," in tow of the "Resolute," it was successfully between 4 and 5 o'clock of the afternoon of the 5th of December, without loss, the work being done under the management and at the risk of the Baker Salvage Company, the second officer of the "Excelsior" supervising the same, hurrying up the laborers, keeping their time, and seeing that nothing was stolen.

The diver, who began his operations about seven a. m. of the 5th of December, as aforesaid, worked steadily until the night of that day battening up the hole with plank and covering the same with canvas; resuming his work at an early hour the next morning, he completed it by one p. m. of the same day, 6th.

On the afternoon of the 5th, after the removal of the cargo to the Old Point wharf had been completed, and the "scud" anchored for safety inside Hampton bar, with but one man left aboard of her as a guard, the "Resolute" came alongside the "Excelsior" on her starboard or weather side, put out fenders, made fast so as to be in position to use her stationary pump, and began to assist in the work of setting up the portable pump on board of the "Excelsior." The work of setting up this portable pump was continued until nine p. m.; the pump and all attachments being furnished by the Baker Salvage Company; only the steam for running it being sup-
21 plied by the "donkey" engine of the "Excelsior," while the "Resolute" was lying on the "Excelsior's" starboard side or windward side, as aforesaid. Between 7 and 8 o'clock on December 5th it began to blow a fresh or strong breeze from the east or southeast, so as to induce the master of the "Excelsior" to request that the "Resolute" lie alongside of the steamer for the protection of the lives of those aboard of her in case her joiner work should be carried away and she should begin to break up. The "Resolute" thus continued to lie on the starboard or weather side of the steamer, it being impracticable to shift her position to the lee side in such a breeze and with such a sea on; and while lying thus she afforded considerable protection to the "Excelsior," acting as a breakwater to her, and incurring considerable risk herself. This wind, which produced quite a rough sea, lasted from between 7 and 8 o'clock on the evening of December 5th until about one o'clock on the following morning; during which time a portion of the crew of the "Resolute" had to be constantly at work putting in the fenders between the steamers, as others would be crushed by the chafing, and keeping them in

position; to do which it was necessary to go between the two steamers upon their guards with no little danger to life or limb. Steam was also kept up on the "Resolute" all night for immediate use in case of emergency.

Soon after daylight on the morning of the 6th work was resumed; the diver and gang battening up the hold, the crew of the "Resolute," under the superintendence of Captain Stoddard, getting ready the stationary pump on board the "Resolute," completing the work of setting up the portable pump on board the "Excelsior" that had been begun the previous evening.

22 The latter was completed about nine a. m., of this day—the 6th—as aforesaid, and was set to work to lower the water in the hold of the steamer, and thus assist the diver in his work of covering the planking with canvas, by drawing the canvas in. The stationary pump was ready by 12 m.; and the diver completing his work of battening soon after that. Both pumps were set to work at their full capacity, so that or near 2.3 p. m. the hull of the "Excelsior" had been so far freed from water, that the tug "Olive Baker," that had been previously engaged to assist in the work, and had a line attached, hauled the steamer afloat. Captain Stoddard at once started to Norfolk with the "Excelsior," having her in tow of the steam tugs "Olive Baker" and "Olive Branch," and the wrecking steamer "Victoria J. Peed;" while the "Resolute" kept alongside, pumping every 20 minutes to keep the hull free from water. Great care was exercised in towing the steamer across Hampton Roads and up the river to Norfolk, as the hole in her bow was only covered with pine boards, one inch thick and one thickness of No. 1 canvas, which might be knocked off by any hard substance floating in the water, that might come in contact with it. The work was successfully accomplished, however, and by five p. m., of Dec. 5th, 1882, the "Excelsior" had been safely docked in Norfolk.

The salvage service was thus successfully completed within less than 45 hours after the aid of the salvors had been invoked, and that without a single error of omission or commission on their part.

23 The work was done with an energy, skill, fidelity, and courage that admit of no question. The officers and crew of the "Excelsior" rendered all the aid in their power to the salvors.

After the "Excelsior" had been safely docked at Norfolk, as aforesaid, the Baker Salvage Company was called upon to furnish materials and supplies, and do other work upon her, for which it presented a bill amounting to four hundred and seventy dollars and seventy cents.

This bill the Potomac Steamboat Co. refused to pay, claiming that the charges made were too large, and that such service was a part of the salvage service. For the amount of this bill the Baker Salvage Co. filed a second libel against the steamer "Excelsior."

The point at which the "Excelsior" was lying, is on the south side of Hampton bar, about midway between its northeastern and southeastern extremities, and on the northern border of Hampton Roads. The locality, an exposed one, vessels ashore there being exposed to all winds from the east round to the southwest; and winds from the

east come right in from the Atlantic Ocean, through the Capes on to the bar, with no breakwater, except that furnished by the ripraps and the small shoals about it. The weather, as it actually existed during the greater portion of the time of the salvage service was moderate, with light winds and no very heavy sea; but on the evening of the 5th of December a strong breeze set in from the east or southeast, between seven and eight o'clock, which lasted until one o'clock on the morning of the 6th, causing the water to be rough, and creating considerable apprehensions for the safety of the "Excelsior." This constantly threatened danger was increased
24 by the fact that the "Excelsior" is an expensively furnished bay and river steamer, standing very high out of the water, and composed almost entirely, above her main deck, of light joiner work, liable to be carried away by winds and waves, with guards from two to three feet wide at her stern to ten or 12 feet wide at her wheel-houses under which, in her then present position, the waves struck with great force, since she could not rise with them, liable to tear up her guards, and to cause her slender joiner work to give way and the steamer to break up.

These things rendered dispatch necessary.

The Baker Salvage Co., the libellant, is a body politic and corporate, with its principal office located at Norfolk, in the State of Virginia. Its business is that [of] wrecker and salvor, in which it is extensively engaged, its operations being conducted in the Atlantic Ocean and Gulf of Mexico, and along the coasts of those waters and the waters tributary thereto, wherever its services may be needed. The capital embarked in the said business is about one hundred thousand dollars, and it keeps constantly on hand, and in readiness for immediate use in its business, a number of powerful steamers and sailing vessels, proper for wrecking services, with a full equipment of the best and most improved wrecking apparatus and gear, such as steam pumps and connections, diving apparatus and gear, hoisting engines, anchors, chains, and cables of unusual size, falls, with a competent force of seamen, navigators, and divers, who have attained skill from their experience in wrecking operations. This immense equipment is kept up at an average expense of five thousand dollars per month during the busy months—say, eight months in the year—and at an average of two thousand five hundred
25 dollars during the balance of the year, and that, exclusive of interest on the large amount of capital invested, being the mere running expenses.

In addition to the wrecking steamers "Resolute" and "Victoria J. Peed," and the schooner "Scud," with all the wrecking appliances and apparatus, its own property, which the Baker Salvage had employed in this service, it had also chartered, and used to assist in the work, the steam tugs "Olive Branch," "Olive Baker," and "Nettie." The Baker Salvage Company had exposed to dangers incident to this salvage service at least fifty thousand dollars' worth of its valuable property, which, in the case of destruction, must have been a total loss, since insurance companies will only insure property so engaged at exorbitant rates, if at all. And the court finds that the

libellant is entitled for its salvage service in this cause to the sum of five thousand six hundred dollars, with interest thereon from the 21st day of Febuary, 1884, until paid, and for work and materials furnished by the libellant to the steamer "Excelsior," after her arrival at her dock in Norfolk, to four hundred and seventy dollars and seventy cents, with interest thereon from Feb'y 21st, 1884, until paid; and the court finds the law to be: That this is a case of salvage; that the work and materials furnished the "Excelsior" after her arrival at her dock in Norfolk was no part of the salvage service; that the alleged contract which the claimant attempts to set up is no bar to meritorious claim for salvage in admiralty; that the libellant, the salvor, is entitled to be rewarded for the salvage service in proportion to the personal risk run by its employees while engaged in this salvage service, to the danger to which its valu-
26 able wrecking equipment was exposed while engaged in this service, to the danger from which the large and valuable property of the claimant has been relieved, to the labor expended by the salvors in rendering the salvage services, and the promptness, skill, and energy with which those services were rendered.

And the court will pass a decree accordingly.

HUGH L. BOND,
Cr. Judge.

27 In the Circuit Court of the United States for the Eastern District of Virginia.

In the Matter of THE POTOMAC STEAMBOAT COMPANY, Respondent and Claimant of the Steamer Excelsior and her Cargo, Appellant,
vs.
THE BAKER SALVAGE COMPANY, Libellant and Appellee.

In Admiralty. On Appeal.

This cause came on this day to be heard upon the libel and answer, the testimony of witnesses, and depositions filed, and the appeal, and was argued by counsel; whereupon the court, after taking time to consider, affirming the decree of the district court below of Feb'y 21st, 1884, doth adjudge, order, and decree that the said Baker Salvage Company, the libellant, do recover of Charles Chauncey and Moncure Robinson, who are the stipulators in the bond given for the release of said vessel from the warrant of arrest issued by the libellant in its salvage suit, the sum of five thousand six hundred dollars, with interest thereon from the 21st day of February, in the year 1884, until paid, at the rate of six per centum per annum, and its costs of suit, and shall have the right to issue out of the clerk's office of this court its writ of execution against both or either
28 of the said stipulators for the amount hereby decreed. And the court files herewith a finding of the facts and conclusions of law upon which this decree is rendered May 19th, 1884.

HUGH L. BOND,
Circuit Judge.

Filed and entered May 19th, 1884.

C. T. BARRY,
Deputy Clerk.

29 THE BAKER SALVAGE COMPANY
vs.
THE POTOMAC STEAMBOAT COMPANY'S STEAMER EXCELSIOR.

The final decree having been entered in this cause, the respondent prays an appeal therefrom to tne Supreme Court of the United States.

THE POTOMAC STEAMBOAT COMPANY,
By WHITE & GARNETT, *Of Counsel.*

The appeal allowed.

HUGH L. BOND,
May 27th, 1884. *Cir. Judge.*

[Endorsed:] Filed May 28th, 1884. G. T. Barry, dep'y clerk.

I certify that bond in the penalty of ten thousand dollars, conditioned according to law, has been filed by the appellants in this cause; and that thereafter the appellants having deposited in the registry of this court the sum of six thousand five hundred dollars, by consent of parties, and by leave of the court, the appellants were allowed to withdraw their said bond.

Witness my hand and seal of said court, this 10th day of October, 1884.

[SEAL.] M. F. PLEASANTS, *Clerk*,
By CHAS. T. BARRY, *Deputy.*

30 The United States of America, Eastern District of Virginia to The Baker Salvage Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington on the second Monday of October next, pursuant to an appeal from a decree of the circuit court of the United States for the eastern district of Virginia in your favor, passed in a cause in said court wherein you were appellees and The Potomac Steamboat Company, claimants of the steamer "Excelsior," were appellants, to show cause, if any there be, why the said decree, so as aforesaid passed, should not be corrected and speedy justice done to the parties in this behalf.

Witness my hand and seal this 27 day of May, in the year of our Lord one thousand eight hundred and eighty-four.

HUGH L. BOND, [SEAL.]
C't Judge.

Service admitted this 27 day of May, A. D. 1884.

THE BAKER SALVAGE CO.,
By JNO. R. WHITEHEAD, *President.*

31 [Endorsed:] Notice of appeal. The Potomac St'mb't Co. *v.* The Baker Salvage Co. Notice & acceptance by Jno. B. Whitehead, pres't Bake- Sal. Co. Filed May 28, '84. C. T. Barry, d'p't. clerk.

32 I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, do hereby certify that the foregoing is a transcript from the record in the cause of The Baker Salvage Company against The Potomac Steamboat Company, lately pending in said court, and contains a true copy of the libel, the answer thereto, and of Exhibit A filed with said answer, of the finding of fact by the court and the final decree thereon, of the prayer for appeal and the order allowing the same, together with the original citation and the service thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Norfolk, in said district, this 10th day of October, A. D. 1884.

[SEAL.]

M. F. PLEASANTS, *Clerk.*
By CHAS. T. BARRY, *Dep't.*

Endorsed on cover: E. Virginia C. C. U. S. No. 1207. The Potomac Steamboat Company, claimant of the steamer "Excelsior," appellant, *vs.* The Baker Salvage Company. Filed November 10, 1884.

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Office Supreme Court U. S.
FILED.
SEP 21 1887
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 181.

OCTOBER TERM, 1887.

The Potomac Steamboat Company, Appellant,

vs. } *In Admiralty.*

The Baker Salvage Company, Appellee.

BRIEF FOR APPELLANT.

—IN THE—

Supreme Court of the United States.

THE POTOMAC STEAMBOAT CO.
vs.
THE BAKER SALVAGE CO.
} APPEAL.

OCTOBER TERM, 1887.

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Virginia, in admiralty, entered in a cause between the Baker Salvage Company, libellants, against the Steamer Excelsior and owners.

The libel and answer thereto and finding of facts constitute the record, and from the decree entered thereon, May 19th, 1884, the Potomac Steamboat Company, appellants, have prayed and obtained an appeal.

The grounds of which are—

1. That in the finding of facts by the Court below, the Circuit Court has ascertained and stated as proved an agreement between the libellants and claimants for a *quantum meruit* for the work and labor done by the alleged salvors, and it was error to decree salvage therefor.

2. The decree, in view of all the facts found by the Court below, was plainly and grossly excessive in the amount awarded the libellants.

The statement of the case in the finding of facts gives the details of the accident to the Steamer Excelsior. The Steamer having been in collision on the evening of December 4th, 1882, with the United States Steam Tug "Fortune," was headed for Hampton Bar and grounded thereon. Her bow was in six feet water and her stern about ten feet.

Her cargo was on her main deck and was not touched by the water.

Having telegraphed to Norfolk about 8 o'clock that evening for what he wanted, her master, Captain Baldwin, awaited the arrival of the Steamer Resolute, with diver and steam pumps, as required in his telegram to the manager of the Baker Salvage Company.

It was not until the next morning, December the 5th, that the "Resolute" and schooner "Scud," with the diver, arrived, and work was commenced and proceeded as alleged in the libel.

But immediately upon his arrival, Captain Stoddard, the manager of the libellant's Steamer Resolute, sought Captain Baldwin, master of the Excelsior, and the following conversation is proved to have occured between them.

Captain Baldwin immediately asks Captain Stoddard "what it was going to cost to get the ship off and deliver her at the railway"? Stoddard replied: "I do not know." To which Baldwin replied: "This is not a salvage service." To which Stoddard replied: "Call it what you please, so I get my pay." To this Baldwin answered: "It is no salvage service," and there the matter ended, and work was commenced, save that they both agreed to submit to arbitration the amount to be received for the service by the Baker Salvage Company, in case the two companies could not agree upon a sum.

Stoddard agreed to go to work at once and did so proceed to work, agreeing also to submit any differences as to the amount to arbitration in case of disagreement.

I. Now while it is not contended that the libellant should not receive a proper compensation for the work done by him; yet it is submitted that the question of salvage was here fairly raised and settled between the parties before any work was done on the vessel.

It was distinctly expressed by Captain Baldwin that this service was not to be charged for *as salvage*, and that view was assented to by the libellant's agent when he said "Call it what you please so I get my pay," and accepted the service.

There was a distinct announcement that *at all events* he must be paid, and there was immediate assent to that proposal by Captain Baldwin, for the work was at once allowed to proceed.

Here there was a stipulation for payment at all events, not conditioned upon success, but to be paid at all events, and such a bargain is inconsistent with the claim of *meritorious salvage.*

Upon this point, counsel would adopt the language of the Court in the case of "The Indepence." 2 Curtis 355.

"In my judgment, a contract to be paid at all events, either a sum certain or a reasonable sum for work, labor and the hire of a steamer or other vessel, in attempting to relieve a vessel in distress, without regard to the success or failure of the efforts thus procured is *inconsistent* with a claim for salvage; and when such contract has been fairly made it must be held binding by a Court of Admiralty and any claim for salvage disallowed."

"When the owner or his representative, or both, become personally liable by the contract to pay either an agreed sum or a *quantum meruit* for the labor and service rendered, without regard to its results, the parties do not contemplate nor engage in a salvage service, but quite a different service. * * * * I do not perceive how a Court of Admiralty can, after the property has been saved, set aside such a contract and declare that a salvage service was performed."

II. The award is plainly and grossly excessive.

If it be found that the parties were contracting for services which were to be paid for without regard to success or failure, then it is plain that the Court erred in decreeing compensation as *salvage.* The reward should have been in proportion to the character and amount of the service rendered. And the elements which enter into this for consideration are few and simple.

The case as tried and decided in the District Court of the United States, is very carefully reported by the Judge who presided at that trial and is found in 19 *Federal Reporter*, 536. After stating the circumstances, he describes the situation of the Excelsior: "She had filled with water and laid easily on the bottom. The sea came over the main deck aft at high tide, but did not cover the deck amidships or forward. Her cargo was amidships and was not reached by the water. She was in a place on the bar and in a position on the bottom that rendered her reasonably safe from further injury, except in the event of rough weather from the eastward."

And he adds that the waves of a rough sea, if perchance such should have arisen, would have endangered the deck and joiner work.

It is also stated that a board of Naval Officers, appointed afterwards for the purpose of inquiring into the collision, found that the Fortune was in fault, and the United States Government has since compensated the claimants in damages from the accident to the amount of $18,350.86. But such compensation was irrespective of and without regard to the claim of the Baker Salvage Company, which claim was excluded from the computation of damages; and the appellant was required by the Navy Department to stand this suit for the determination of the question of salvage.

In the District Court the United States Attorney appeared for the Government and united in the appeal to the Circuit Court.

And it is understood that the United States is to be here represented by counsel.

The appellants urge the consideration of the *nature* of the *service.*

It was rendered for hire by a wrecking company, organized and incorporated for the business of wrecking.

Upon this subject the Court, in the case of the H. B. Foster, Abb. Adm. 222, says:

"At most, in reference to mere harbor-service and that rendered about "the mouths of their own ports, it is by no means manifest that steam- "ers whose regular pursuit is to tow and relieve vessels should be re- "garded as meriting a reward out of all relation and proportion to what "would have been accepted as satisfactory on a fair bargain for their ser- "vices."

"The calling of itself will be sufficiently encouraging and advantageous "without the aid of the stimulus of high salvage awards." Id. 234.

The case of the *Connemara*, cited by counsel for appellees in their brief, differs essentially from the case at bar in this: That the rescue in that case was from a present and imminent peril of destruction by fire, and there was no evidence to rebut the finding of the fact of *salvage.*

The Act of 1875, while limiting the revisory power of this Court to questions of law, does not prevent the correction of errors in the exercise of unreasonable discretion by the inferior Courts. The award of salvage

was an error of law, for the correction whereof appellant prays that the decree may be reversed.

Theodore S. Garnett

THEODORE S. GARNETT,

OF WHITE & GARNETT,

Counsel for Appellant.

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SUPREME COURT U.S.
OCT 4 1886
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1884.

No. 1,207.

The Potomac Steamboat Company, Claimant of the Steamer Excelsior, Appellant.

vs. } *In Admiralty.*

The Baker Salvage Company, Appellee.

APPELLEE'S BRIEF.

Supreme Court of the United States,

OCTOBER TERM, 1884.

No. 1,207.

The Potomac Steamboat Company, Claimant of the Steamer Excelsior, Appellant.

vs. } *In Admiralty*

The Baker Salvage Company, Appellee.

APPELLEE'S BRIEF.

First. The facts certified by the Circuit Court in this case constitute a salvage service. Property of great value was relieved with promptness and skill from an impending peril of the sea, by the voluntary exertions of those who were under no obligation to render assistance, and the property was ultimately saved. The Connemara, 108 U. S. R., p. 352.

Second. The finding of facts in this case does *not* ascertain any agreement between the libellants and claimants for a

quantum meruit, for the work and labor done by the libellants. Exhibit "A" filed with the claimant's answer is not evidence on that point. It is but an *ex parte* statement of the master of the Excelsior reduced to writing after the salvage service was rendered, to be used as a pretext for refusing to pay anything whatever. Even the answer itself is not evidence in the case. Sheerwood vs. Hall, 3 Sumner, 127; Andrews vs. Wall, 3 H., 568. The Court certifies what the conversation was between Stoddard and Baldwin, on page 9 printed record. On page 13 the Court finds the law to be, "that the *alleged* contract which the claimant *attempts* to set up is no bar to meritorious claim for salvage in Admiralty." The most that the conversation between Stoddard and Baldwin can possibly amount to, is that in case the two companies could not agree upon a sum to be paid for the "service," rendered by the Baker Salvage Company, the question of the amount of compensation should be left to arbitration. Nothing short of a contract to pay a given sum for the service to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful, will operate as a bar to a meritorious claim for salvage. The evidence must show a definite and explicit bargain. The Camanche, 8 Wall., 477; the Independence, 2 Curtis, 350; the Salacia, 2 Hagg. Adm., 262.

It does not appear that the libellants refused to refer the amount of compensation to arbitration; but if they had actually refused to refer their claim to arbitration, as agreed, that is no bar to a suit for salvage. Coffin vs. the John Shaw, 1 Cliff, 230.

The respondents, in their answer, on page 7 of the printed record, solemnly submitted to the judgment of the Court the amount of compensation the libellants might be reasonably entitled to receive, no matter whether in the form of salvage or otherwise. It is also to be observed that this idle talk between Baldwin and Stoddard occurred after the salvage service had been partly rendered. The mere fitting out the expedition and

going promptly to the relief of the stranded steamer when summoned was of itself a salvage service. The Williams, 1 Brown, Adm., 218; the Susan, 1 Sprague, 499. In proportion to the estimated value of the steamer and cargo, which is $160,000, the sum of $5,600 found by the Court is not "plainly and grossly excessive" in amount. The sum decreed as salvage is only 3½ per cent. of the value of the property saved to the claimants, whereas in the case of the Connemara a salvage of 6 per cent. on a larger amount, and for less actual service was affirmed by this Court.

Third. But even if the amount awarded in the Courts below in this case appears to be too large, this Court will not alter the decree for that reason only. The decree was rendered by the Circuit Court under the Act of Congress of 16th February, 1875, ch. 77, which restricts the appellate power of this Court, and limits its revisory authority to questions of law. The Connemara, *supra.* Even before the Act of 1875 this Court never reduced the amount of salvage decreed below, unless for some violation of just principles, or for clear and palpable mistake, or gross over-allowance. Idem. citing Hobart vs. Drogan, 10 Pet., 108, 119, and other cases, page 359.

Fourth. The suit of the Baker Salvage Company against the Excelsior for supplies and work and materials amounting to $470.70 was tried on appeal in the Circuit Court, simultaneously, with the salvage suit, but they are wholly disconnected, and separate and distinct decrees were rendered. The mention of it in this record arose from the fact of the two cases being tried at the same time, and one certificate of the Court seems to have been made to answer the requirements of the statute in the two cases. The decree of the Circuit Court in this case is for the sum of $5,600.00 with interest thereon from the 21st day of February, 1884, until paid, at the rate of six per cent. per annum, and the appellee's costs of suit, with